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May 19, 1993

No. 2046.002

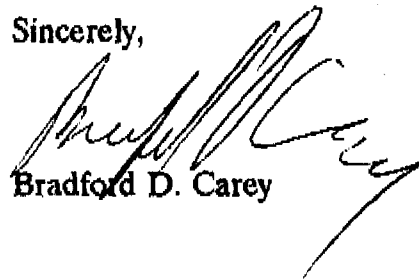
Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M. Street, N.W.
Washington, D.C. 20554RE: MM Docket No. 93-51
Applications of Martha J. Huber, et al, for
Construction Permit for FM Station, Channel 234A
New Albany, Indiana

Dear Ms. Searcy:

Transmitted herewith for filing is an original and six (6) copies of a *Reply to Opposition to Enlarge Issues* filed on behalf of Midamerica Electronics Services, Inc., in the above referenced matter.

Should the commission have any questions, kindly direct them to the undersigned.

Sincerely,


Bradford D. CareyBDC/vmm
Enclosures

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Before The

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**Federal Communications Commission**

Washington, D.C. 20554

In re Applications of)

MARTHA J. HUBER, *et al.*,)For a Construction Permit for a)
New FM Station on Channel 234A)
in New Albany, Indiana)MM Docket No.
93-51

TO: The Honorable Administrative Law Judge Sippel

REPLY TO OPPOSITION TO ENLARGE ISSUES

Midamerica Electronics Service, Inc., ("Midamerica") by Counsel, hereby states its Reply to the *Consolidated Opposition to Motions to Enlarge Issues of Martha J. Huber to the First Motion to Enlarge Issues Against Martha J. Huber*. (the "*Motion*" and "Huber" respectively). Huber's consolidated pleading also opposes the similar motion of Rita Renya Brent ("Brent").

At the prehearing conference in this matter, held May 18, 1993, Brent's Counsel provided Midamerica's Counsel a copy of Brent's Reply pleading. Midamerica supports the arguments made by Brent.¹ Further, Midamerica notes that Huber's *Opposition* is predicated on essentially two grounds. Huber argues that the *Motion* is procedurally deficient and that the bank letter is a valid and binding loan commitment sufficient to meet the Commission's standards. Huber is wrong on both counts.

¹except as may be inconsistent with the positions taken by Midamerica

For an applicant to rely on a "bank letter" for its certification to the Commission that it has reasonable assurance of its ability to finance construction of the proposed station and initial operation of the station without revenue for three months, the letter must represent a present commitment of the bank, future capital conditions permitting, to fund a loan. A reservation to the bank that the applicant's credit worthiness for the loan is subject to re-review at the time a loan would be made might, itself, not vitiate reasonable assurance. But, the bank must have made a present determination that it will fund a loan, conditions in the future being what they are at the time the letter is issued.

When an applicant purports to rely on a bank letter for its financial qualifications, the terms and conditions must be determinable from within the four corners of the document. Otherwise, substantial and material issues of fact (the terms of the proposed loan and whether the bank is a committed source, as required by the Commission) are *per se* extant and must be resolved with an evidentiary hearing.

From within the four corners of the Citizen's Fidelity letter, it cannot be determined that Huber has reasonable assurance of her ability to fund litigation, construction and operation. Huber as much as concedes this in her *Opposition*.

Huber appends to her *Opposition*, a recent letter from PNC Bank, under the signature of Leo Tierney, Senior Vice President, PNC Bank, Indiana, Inc. dated May 5, 1993. (the "1993 letter"). The very fact that Huber found it necessary to "amplify" (using Mr. Tierney's term) the original letter to respond to the *Motion* demonstrates that the original letter was and remains deficient. Mr. Tierney's statements in the

1993 letter cannot be considered in determining whether or not a material and substantial issue exists as to whether, at the time she filed her application, Huber had the requisite reasonable assurance, as measured by the Commission's standards. Stripped of the *post hoc* explanations, a substantial and material issue exists as to whether the original letter constituted the then present firm commitment of Citizen's Fidelity Bank to make the loan, future capital conditions permitting, and to meet the Commission's standards for reasonable assurance.

Midamerica urges that the answer must be that a substantial and material issue exists (if regarding nothing more than whether the interest rate and/or the length of the loan had been agreed to at the time of the original letter) that must be explored at hearing.

For another reason, nothing contained in the 1993 letter can be used to support Huber's defense. The letter is neither notarized nor executed under penalty of perjury. It cannot be relied upon by Huber as evidence of what the terms were or might have been. Nor is any explanation offered for Huber's ignoring this very

an evaluation is all that need be shown to demonstrate that there is a substantial and material question of fact to be resolved at hearing.

It is undisputed that the face amount of the bank letter exceeds the value of the physical assets which are to be acquired to build the station. As noted by Midamerica, the letter does not state any requirement for other collateral or personal guarantees. Huber listed the proposed bank loan as her only source of financing. (How she is to pay for the cost of litigation or filing fees--assuming that she is to pay these costs--is unstated). It is common knowledge that (at least these days) banks don't fund these kind of transactions with out security that at least equals the loan amount. Yet, without proposing to require even Mrs. Huber's personal guarantee (or her husbands), this bank, if its letter is to be credited, will loan \$350,000 for a project with hard assets worth considerably less without other security (Of course, no dollar value may be ascribed to the permit or license).

Furthermore, if Huber's financial plan were to be believed, the bank would not require that Huber invest even one penny herself. That is not the way banks work, or are supposed to work.

In view of the foregoing, Midamerica respectfully urges that the requested issues be added.

Respectfully Submitted,

MIDAMERICA ELECTRONICS SERVICE, INC

By: 

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Its Attorneys

CERTIFICATE OF SERVICE

I, Valerie McGuire, a secretary for the law firm of Hardy & Carey, do hereby certify that a copy of the above and foregoing document has been served on counsel for all parties to this proceeding, by mailing a copy of same via U.S. Mail, postage prepaid, this 19th day of May, 1993, addressed to the following:

Honorable Richard Sippel*
Judge
Federal Communications Commission
2000 L Street, N.W., Room 214
Washington, D.C. 20054

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Hearing Branch
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